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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1344

HUMBLE OIL & REFINING COMPANY, *Appellant*,

v.

RAILROAD COMMISSION OF TEXAS, ET AL., *Appellees*

On Appeal to the Supreme Court of the United States From the Court of Civil Appeals for the Third Supreme Judicial District of Texas

---

APPELLANT'S REPLY TO APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

J. A. RAUHUT,
NELSON JONES,
NORMAN L. MEYERS,
Counsel for Appellant

Of Counsel:
REX G. BAKER,
R. E. SEAGLER,
POWELL, WIRTZ, RAUHUT & GIDEON

ALPHA LAW BRIEF CO., HOUSTON

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Appellant, Humble Oil & Refining Company, replying to the opposing statement and motion to dismiss or affirm filed by appellees, would show:

Summary of Appellant's Reply

Contrary to appellees' contentions,

(1) The questions presented by this appeal were not settled adversely to appellant by the decisions of this Court in RAILROAD COMMISSION v. ROWAN & NICHOLS OIL CO.,

310 U.S. 573, 60 S. Ct. 1021; RAILROAD COMMISSION v. ROWAN & NICHOLS OIL CO., 311 U.S. 570, 61 S. Ct. 343; RAILROAD COMMISSION v. HUMBLE OIL & REFINING COMPANY, 311 U.S. 578, 61 S. Ct. 347.

(2) The decision of the Texas court has the effect of sanctioning a taking of appellant's property in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the CONSTITUTION.

I.

This Court has not heretofore ruled adversely to appellant's contentions, and the questions involved in the appeal are substantial.

Appellees in their Motion to Dismiss or Affirm contend that in three cases involving attacks on proration orders of the Railroad Commission of Texas for another oil field this Court has settled adversely to appellant the contentions raised in this case involving the proration order of the Railroad Commission relating to the Hawkins Field. (The ROWAN AND NICHOLS cases and the HUMBLE case governed by them, cited *supra*). In doing so the appellees misconstrued both the purport of the ROWAN AND NICHOLS cases and the basis for this appeal.

Under Texas law appellant is the owner of the oil and gas in place under its leases and is entitled to a fair opportunity to recover the oil and gas in or under its land. TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717; BROWN v. HUMBLE OIL & REFINING COMPANY, 126 Tex. 296, 83 S.W. (2d) 935; MARRS v. RAILROAD COMMISSION, 142 Tex. 293, 177 S.W. (2d) 941; GULF LAND COMPANY v. ATLANTIC REFINING COMPANY, 134 Tex. 59, 131 S.W. (2d) 73.

Prior to the conservation laws, the means of producing the oil in place was governed by the common law right of capture. In all cases upholding the right of capture the courts have recognized the correlative rights of owners in an oil field. The courts held that ratable taking from a common reservoir of oil was to be achieved by permitting each producer to produce whatever he could from his own wells, drilled as he deemed fit. Other producers protected their correlative rights by drilling offset wells and producing headlong to prevent drainage by their neighbors. Thus the ability of one to capture was limited by the ability of all others simultaneously to capture. PRAIRIE OIL & GAS CO. v. STATE OF TEXAS, 231 S.W. 1088; TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717; HARDWICKE, "RULE OF CAPTURE AND ITS IMPLICATIONS AS APPLIED TO OIL AND GAS," 13 Texas Law Rev. 401.

The conservation laws of Texas are designed to eliminate waste and to protect the correlative rights of all producers in a field subjected to administrative controls. The Legislature has delegated to the Railroad Commission powers, legislative in character, to control the spacing of wells (VERNON'S TEXAS CIVIL STATUTES, Article 6014), to limit the allowable production of an oil field (Id. Article 6049c), and to prorate the allowable production among the various producers "on a reasonable basis." (Id. Article 6049c, Section 7.) Proration "on a reasonable basis" has been uniformly interpreted as proration designed to accord each producer in a field opportunity to obtain without waste the oil in place beneath his lease or its equivalent in kind.

> "It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalent in kind." GULF LAND COMPANY v. ATLANTIC REFINING CO., 134 Tex. 59, 131 S.W. (2d) 73, 80.

In the ROWAN AND NICHOLS cases, the validity of proration orders for the East Texas field was challenged by appeal to the Fourteenth Amendment. In those cases the landowner contended that the proration orders were, by the weight of the evidence, unfair and confiscatory. In both cases this Court refused to sustain lower Federal Courts' "judicial judgment" in opposition to the "administrative judgment" of the Railroad Commission on the principle that where the evidence is conflicting the court will not overturn Railroad Commission orders.

In the first ROWAN AND NICHOLS case this Court said:

> "Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptious for courts, *on the basis of conflicting expert testimony*, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment." * (310 U.S. p. 581.)

Furthermore in that case the court stated:

> *"No less is there conflict in the evidence as to the solidity of respondent's apprehension that there will be drainage of oil beneath its surface by neighboring wells. The Commission's experts insist that the threat, if existent at all, is speculative, and that the Commission's power of continuous oversight is readily available for relief if real danger should arise in the future.*
>
> *"Plainly these are not issues for our arbitrament."* (310 U.S. 583.)

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* All emphasis ours throughout this brief unless otherwise indicated.

That the same is true of the second ROWAN AND NICHOLS decision is demonstrated by the following language copied from the opinion of this court:

> *" * * * it is clear that the Due Process clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses.*
> *"This record gives little justification for confidence in such testimony as the basis for jurisdictional dogmatism."* (311 U.S. 576.)

This court's opinion in the HUMBLE case (311 U.S. 578), consists merely of a statement that the case is ruled by the second ROWAN AND NICHOLS decision.

Thus this court did not hold in the cited cases that it would refuse to interfere with the confiscation of property by the Commission; neither the Commission, nor the Legislature itself, can write an order clearly confiscatory in character under the guise of an exercise of administrative discretion or judgment. This court, in the ROWAN and NICHOLS cases, held only that it would refuse to determine from conflicting evidence whether the Commission's orders in fact resulted in confiscation. In determining whether the challenged orders were confiscatory, the ultimate issue of fact in the ROWAN AND NICHOLS cases was whether such orders resulted in uncompensated net drainage of oil from Rowan and Nichols' lease. Stated in another way, the ultimate issue of fact was whether the challenged orders would prevent Rowan and Nichols from recovering a quantity of oil equivalent to the amount of recoverable oil originally in place beneath Rowan and Nichols' lease. It was contended by the Commission that Rowan and Nichols would recover under the challenged orders, "at least the equivalent of the recoverable oil originally in place beneath such lease." (85 L. Ed. 359.) If

that were true, the orders complained of were not confiscatory. According to the opinion of this court, there was evidence introduced in support of that contention and this court declined to determine the disputed issue of fact.

This appeal is not prosecuted as in the ROWAN and NICHOLS cases upon a challenge of the validity of an order promulgated by the Railroad Commission in the exercise of its administrative judgment when faced with "a conflict of expertise," and the appellant is not asking that the court substitute its judgment for that of the Commission as to any such conflict. This appeal is bottomed upon the results of a Commission order which are undisputed by the Commission and which appellant asks this court to find confiscatory, leaving to the Commission its administrative function of promulgating a proper proration order which will not have the results admitted by the Commission to be inherent in the order under attack.

Practically all of the Hawkins field involved in this case is drilled under a 20-acre spacing rule. The validity of the 20-acre spacing rule as a conservation measure is undisputed. Under exceptions to this rule the Commission has permitted the drilling of 87 wells in a townsite within the boundaries of the field having an average of less than one acre per well. Rule 15 is the proration order which was first promulgated shortly after the discovery of the Hawkins field and before full geologic data were available. The original Rule 15 prorated production on the basis of 50 per cent allocation to each well and 50 per cent to acreage; no change has been made in this basic formula.

It is conceded that Rule 15 already has resulted in substantial uncompensated excess drainage of oil in vast quantities from appellant's properties and that such drainage will continue so long as this Rule remains in effect. The *fact* that the challenged Rule results in the drainage of huge quanti-

ties of oil from appellant's leases to the wells of the townsite operators, thereby depriving appellant of any opportunity to recover the oil in place in its properties, is established by the undisputed evidence, the verdict of the jury, the admissions of appellees, and the findings made by the Court of Civil Appeals. There is no escape from the conclusion reached by the Court of Civil Appeals that:

> "While there was sharp conflict in the testimony upon several factual issues *there was no conflict regarding the issue of substantial, uncompensated excess drainage. All of the witnesses testified, and appellants* (Railroad Commission, et al.) *admit in their brief, that there was such drainage, although not conceding the extent thereof, as testified to by Humble's witnesses.*" (JURISDICTIONAL STATEMENT, Appendix, page 10, 193 S.W. (2d) 829.)

It was undisputed, and found by the court below, that Rule 15 is not necessary to prevent waste. As set forth in the JURISDICTIONAL STATEMENT (p. 16), the Court of Civil Appeals, having found that appellant's property is being taken without any justifying public purpose, nevertheless held that Rule 15 is valid because under another rule (the spacing rule), which is not involved in this suit, appellant has been "saved" a large sum in drilling expense.

It is submitted that the issues in this case, so well delineated by the decision of the Court of Civil Appeals, are substantial and have not been settled adversely to appellants in the ROWAN AND NICHOLS cases.

Appellees, however, propound the novel doctrine that the decision of the Court of Civil Appeals from which this appeal is taken, should be disregarded and that "the validity of the order as sustained by Texas courts must be said to rest upon its reasonableness in the light of the entire record and upon a consideration of all relevant factors." (Appellees' op-

posing statement, p. 6.) Appellees' opposing statement then proceeds to discuss the record in this case which is not yet before the court and the records in the ROWAN AND NICHOLS cases involving different issues under a different set of orders.

This case was first tried before a jury in a state district court. The trial court and jury found for the appellant. Appellees in appealing to the Court of Civil Appeals relied upon four contentions. The Court of Civil Appeals sustained only one, that the order was not unreasonable or confiscatory and was within the powers of the Commission. The Court of Civil Appeals found, as did the trial court, that appellant is suffering uncompensated excess drainage to the townsite operators but justified such drainage by alleged offsetting compensations flowing from the spacing rules. The Supreme Court of Texas denied applications to it for writs of error with the docket notation, "Refused. No reversible error." As appellees point out, under Texas practice such a notation indicates that, while the application presents no error which requires reversal, the Supreme Court does not agree that the Court of Civil Appeals in all respects has correctly declared the law. (Appellees' Opposing Statement, p. 5; Rule 483 of the TEXAS RULES OF CIVIL PROCEDURE, Vernon's 1946 Supplement.)

The appellees would deduce from this notation that the Supreme Court of Texas in concurring in the result decided that the record disclosed that the Commission's order was within the discretionary powers of the Railroad Commission, whether or not the single positive holding by the Court of Civil Appeals that "the compensatory effect of reduced drilling cost" made it so, is valid as a matter of law. However, under Texas practice, findings of fact by the Court of Civil Appeals are conclusive. NATIONAL COMPRESS CO. v. HAMLIN, 114 Tex. 375, 269 S.W. 1024. The Court of Civil Appeals found that there is substantial, uncompensated excess

drainage and that there is no dispute as to this between the parties. If the Supreme Court of Texas did not concur in the positive holding of law as to the compensatory effect of reduced drilling costs, there is nothing to indicate why it concurred in holding the order was "reasonable" within the meaning of the state statute. In any event, appellant now comes before this court for relief under the Fourteenth Amendment from the ruling of the Court of Civil Appeals as applied to the undisputed facts of substantial, uncompensated excess drainage.

Appellees in moving to dismiss or affirm, ignore the decision of the court from whom the appeal is taken and purport to show the similarities in the record in this case and in the ROWAN AND NICHOLS cases. Detailed references to the record in this case are made in an effort to show a conflict in expert testimony so as to bring the case within the rule of the ROWAN AND NICHOLS cases. However, this court, with the motion to dismiss or affirm before it, does not yet have the record before it. If there is to be dispute over the content of the record it should be when the case is heard upon appeal and the record is available.

Actually the record does not support appellees' contentions. As has been quoted *supra*, the Court of Civil Appeals stated that "while there was sharp conflict in the testimony upon several factual issues, there was no conflict regarding the issue of substantial uncompensated excess drainage." If it be appropriate to refer to detailed testimony in the record, testimony of appellees' own witnesses is replete with statements substantiating the finding of the lower court. These witnesses conceded that Rule 15 is not necessary to prevent waste and will cause appellant to lose millions of barrels of oil by drainage. (R. 1405, 1340, et seq., 1703, et seq., 1784, et seq.)

Instead of referring to the records in the ROWAN AND

NICHOLS cases, appellees might more appropriately look to their statements as to the law of Texas made in those cases. There Rowan and Nichols Co. contended that it was entitled to excessive drainage or migratory oil to its leases in the East Texas field. The Railroad Commission in its brief filed in this court by Mr. James Hart, then Assistant Attorney General of Texas, in the second ROWAN AND NICHOLS case stated:

> "Rowan & Nichols Oil Company has recovered and is recovering its fair share of the total field allowable under the Railroad Commission's plan of proration, and, if the plan of proration attacked is continued in effect, Rowan & Nichols Oil Company will recover from the wells drilled on its lease at least the equivalent of the recoverable oil originally in place beneath such lease." (Brief for Appellants, No. 218, in the Supreme Court, October term, 1940, pp. 33-34.)

On page 35 of the same brief the Commission stated its position in the following language:

> "It is our position that the Railroad Commission is not legally required to prorate on the basis of current reserves and that it may properly consider in framing the plan of proration the amount of oil ultimately to be recovered by each section of the field. *If the Rowan & Nichols Oil Company, considering the entire production from its leases, will obtain an amount of oil equivalent to the recoverable oil originally beneath its leases, it will have received the full measure of its legal rights. Brown v. Humble Oil & Refining Co.*, 126 Tex. 296; *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59."

On page 60 of the above mentioned brief the Commission said that the adoption of the formula contended for by

Rowan and Nichols *"would result in the confiscation of the property of other operators"* because ultimately it would allow Rowan and Nichols to produce more than the quantity of recoverable oil originally under the Rowan and Nichols lease.

The above quotations from the Commission's brief in the second ROWAN & NICHOLS case are found also in the Commission's briefs in the first ROWAN & NICHOLS case and the HUMBLE case. The Commission was able to prevail in those cases only because it convinced this court that, in the expert opinion of the Commission, the complainants ultimately would produce their oil in place or its equivalent and, therefore, were not the victims of confiscation.

Now the Railroad Commission, in defense of its orders in this case, has completely reversed the position it maintained successfully in the ROWAN & NICHOLS cases. In this case, as a result of the Commission's orders, the producers on townsite locations in the Hawkins field are enjoying migratory oil from substantial uncompensated excess drainage. It is admitted that as a consequence appellants will be unable to recover "an amount of oil equivalent to the recoverable oil originally beneath its leases" and it would appear that this "would result in the confiscation of the property" of appellants. However, appellees argue in their motion that there is no essential difference between appellant's basic contentions and the claims of the complainant in the ROWAN & NICHOLS cases. Appellees would liken appellant's contention here to the claim of Rowan and Nichols that a proration order must be based upon acre feet of sand in order to be valid. This argument of appellees is merely an effort to avoid the real issue. Appellant has not requested the courts to write another proration order for the Hawkins field. Nor has appellant suggested any factors which must be included in the Hawkins order. Appellant has confined itself to a complaint that the order in

suit is invalid because it results in the confiscation of appellant's property in accordance with the statement of law hitherto adhered to by the Railroad Commission. The appellants are prepared to show that according to the record and the opinion of the court below, it would be a simple matter for the Commission to reduce the drainage of appellant's oil without causing waste. However, appellant is not espousing any particular formula or factors. As this court pointed out in the ROWAN AND NICHOLS cases and, as the Supreme Court of Texas said in MARRS V. RAILROAD COMMISSION (supra) it is not the function of the courts to write proration orders for the Commission; it is the function of the courts to declare invalid any order which admittedly takes oil from one operator and gives it to another.

It is clear that substantial questions are raised; whether the taking of millions of barrels of appellant's oil for the private use of the townsite operators, when such taking is not necessary to prevent waste, on the ground that appellant is "compensated" for the loss of its oil by reason of "reduced drilling expenses" under the spacing rule is in violation of the due process clause of the Fourteenth Amendment, and whether admitted substantial, uncompensated excess drainage of oil from appellant's properties to the wells of the townsite operators, where such drainage could be reduced or prevented without waste, denies the appellant its rights under the equal protection and due process clauses of the Fourteenth Amendment. It is equally clear that these questions have not been settled adversely to appellants by the ROWAN AND NICHOLS cases.

It is submitted that the motion to dismiss or affirm on the ground that questions presented have been settled in prior decisions be denied and the appeal allowed so that this appellant may have its day in court on the constitutional issues raised herein.

II.

The decision of the Texas Court has the effect of sanctioning a taking of appellant's property in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

In the opposing statement (p. 14) Appellees appear to argue that (1) testimony in the record demonstrates that, were there no proration and if the rule of capture prevailed unrestricted, the drainage from appellant's property would have been [illegible] than under Rule 15, (2) therefore, Rule 15 does not cause drainage, (3) the rule of capture is still a property right enjoyed by appellees, (4) by virtue of the rule of capture townsite operators under local law are entitled to the fruits of "substantial uncompensated excess drainage" to their wells, and (5) therefore the decision of the Court of Civil Appeals is based upon a non-federal ground.

(1) In resorting to citations from the record appellees again ignore the decision of the lower court. The Court of Civil Appeals found "Just what effect unrestricted production would have on the field was not shown and probably could not be shown." (193 S.W. (2d) 832.) And it is immaterial what unrestricted production might have produced; once conservation laws impose restrictions to prevent waste.

> " * * * every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalents in kind, and that any denial of such fair chance would be confiscation." RAILROAD COMMISSION OF TEXAS v. GULF PRODUCTION COMPANY, 134 Tex. 122, 132 S.W. (2d) 254.

(2) Under Rule 15 there is admitted excess drainage. The

lower court held (193 S.W. (2d) 832) and appellees admit that Rule 15 as drafted is not needed to prevent waste, and furthermore appellees concede that Rule 15 could be readily amended to *reduce* drainage. (Appellees' Opposing Statement, p. 15.) To the extent Rule 15 does not *reduce* excess drainage it is causing the excess drainage against which appellant seeks relief. In GULF LAND CO. v. ATLANTIC REFINING CO., 134 Tex. 59, 131 S.W. (2d) 73, the Supreme Court of Texas said:

> " * * * the term 'confiscation' evidently has reference to depriving the owner of a fair chance to recover the oil and gas in or under his land. *It is evident that the word refers principally to drainage.*"

(3) The rule of capture concededly is still a property right enjoyed by appellees and appellants alike, but for both the rule is limited by the rule of ratable taking under conservation laws. In BROWN v. HUMBLE OIL & REFINING CO., 126 Tex. 296, 83 S.W. (2d) 935, the Texas Supreme Court defined in clear, unmistakable language the "rule of capture" and the property rights acquired under that rule when it said:

> " * * * The exercise of the police power under this rule (Rule 37) does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed. Each person still owns the oil and gas in place under his land, and each still has the right to possession, use, enjoyment, and ownership of the oil and gas produced through wells located on his land, regardless of its origin. The primary rule of ownership is still operative. The rule of convenience becomes secondary.
>
> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than pre-

scribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land. * * *

"The Commission, in order to prevent waste, has the power to limit the rate of flow in the same way that it has the power to regulate spacing. See Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.), 49 S.W. (2d) 837. This right to control the rate of flow in order to prevent waste also enables the Commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage. In this way the commission, by controlling the oil stored in the common reservoir, is enabled to carry out the dominant purpose of preventing waste, and, at the same time, permit each owner to enjoy the opportunity fully to realize upon his estate by developing and recovering his oil and gas."

cf. BURFORD v. SUN OIL CO., 319 U.S. 315, 322 63 S. Ct. 1098, 1101.

(4) The townsite owners' claim to "share in the migration of oil" is contrary to Texas law, as set forth in the cases quoted and cited above. RAILROAD COMMISSION v. MAGNOLIA PETROLEUM CO., 169 S.W. (2d) 253, cited by appellees, does not support the contention of appellees. This is clear both upon the facts of that case and from subsequent cases

by the same court interpreting the Magnolia decision. MILLER v. RAILROAD COMMISSION (T.C.A.), 185 S.W. (2d) 223, 226; KRAKER v. RAILROAD COMMISSION, 188 S.W. (2d) 912.

(5) "Uncompensated drainage" is a taking of property. The Court of Civil Appeals found this "reasonable" because of alleged savings in drilling costs. Appellant here contends that such alleged "savings" are chemerical* and irrelevant. Under the Fourteenth Amendment, its property cannot be confiscated for private use by Commission order on any theory that under other Commission orders there might be some savings to which it would be entitled in any event. THOMPSON v. CONSOLIDATED GAS CO., 300 U.S. 55, 57 S. Ct. 364.**

Appellees say on page 17 of their motion to dismiss or affirm that on the question of appellant's property rights in oil, the holding of the Texas court is final, citing FOX RIVER PAPER CO. v. RAILROAD COMMISSION, 274 U.S. 651, 47 S. Ct. 669. Appellees would lead this court to believe that the Court of Civil Appeals held that, under Texas law, the Commission is not required to restrict each operator to the oil in place beneath his lease, or the equivalent in kind thereof. The error of this contention is apparent from the following language from the opinion of the Court of Civil Appeals:

> "The general legal principles applicable to the factual situation here presented, we believe, are now well settled by the adjudicated cases. They may be briefly summarized as follows:

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* Under the lower court theory appellant apparently is to be content with savings from not drilling wells for oil it is not to receive.

** "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 300 U.S. 55, 80, 57 S. Ct. 364, 376.

"Oil in place belongs to the owner of the soil, but due to its fugacious nature is subject (absent conservation restrictions) to the unlimited right of capture. Both this ownership (title) and unlimited right of capture are property rights, and neither can be infringed except in a proper administration of our conservation laws. See Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. (2d) 935, 87 S.W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; Corzelius v. Harrell, Tex. Sup., 186 S.W. (2d) 961.

"Rule 37 (spacing rule) and the exception thereto to prevent confiscation of property (as also waste, not here involved) as well as the limitation of production through proration, have been uniformly upheld, as valid exercises of the police power in the interest of conservation of a natural resource. Any restriction upon the number of wells drilled or the amount of production therefrom is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure. *In the exercise of this right of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations, afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent.*" (193 S.W. (2d) 832.)

The issues raised herein are not and can not be settled upon any non-federal ground.

Jurisdiction of this Court lies upon this appeal. State procedure has been followed from the Railroad Commission to the State Courts. The judgment of the Court of Civil Appeals, here sought to be reversed, became final upon refusal of the Supreme Court of Texas of an application for writ of error and is the judgment of the highest court of the State of Texas in which a decision of this suit could be made. However, ultimate review of the Federal questions is fully preserved by this Court. MATHEWS v. RODGERS, 284 U.S.

521, 52 S. Ct. 217; BURFORD v. SUN OIL CO., 319 U.S. 315, 63 S. Ct. 1098.

Conclusion

In conclusion, it is clear under Texas law that the only basis upon which the Commission may restrict appellant's production is (1) to prevent waste or (2) to protect correlative rights, that is to prevent excessive noncompensated drainage.

The court below found, and appellees concede, that the Commission's order is not necessary to prevent waste according to the *undisputed facts*. The court below also found that Rule 15 *causes* excessive noncompensated drainage and that on this issue the evidence is undisputed.

It is an undisputed *fact* that appellant has drilled all of the wells which it can drill under spacing regulations and all the wells it needs to produce its share of the oil without waste.

The Court of Civil Appeals tries to justify the arbitrary and confiscatory order on the *sole ground* that appellant had saved money by drilling on a 20-acre pattern, thus holding that the Commission could take appellant's oil and give it to the townsite operators when it was not necessary to do so to prevent waste and when in doing so it destroyed correlative rights in violation of the Commission's mandatory duty.

Thus, the *sole issue* in the case is the confiscatory character of Rule 15 in violation of the due process and equal protection clauses of the Constitution. There *is no issue of fact.*

Appellant has exhausted its efforts for relief in the state courts, for the state Supreme Court has denied application for writ of error, and the judgment of the Court of Civil Appeals has become final under the law of Texas.

Thus appellant has been obliged to turn to this Honorable

Court for protection of its Constitutional right to be protected against an arbitrarily confiscatory order. The Federal question is clearly presented; and, as has been shown, the injury to appellant is very substantial.

Wherefore, for the reasons stated above it is respectfully submitted that Appellees' Motion to Dismiss or Affirm should be denied and the Appeal be allowed.

Respectfully submitted,

J. A. RAUHUT,
Brown Building,
Austin, Texas;

NELSON JONES,
Humble Building,
Houston, Texas;

NORMAN L. MEYERS,
Shoreham Building,
Washington, D. C.,
Counsel for Appellant

Of Counsel:
REX G. BAKER,
R. E. SEAGLER,
Houston, Texas;

POWELL, WIRTZ, RAUHUT & GIDEON,
Austin, Texas